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Supreme Court of the United States

OCTOBER TERM, 1923

JAMES C. DAVIS, Agent,
Petitioner,

vs. No. [redacted]85

MRS. MARY KENNEDY, Administratrix,
Respondent.

BRIEF FOR PETITIONER.

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February 18, 1924.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

James C. Davis, Agent,

Petitioner,

versus

No. 371.

Mrs. Mary Kennedy, Administratrix,

Respondent.

BRIEF FOR PETITIONER.

May it Please the Court:

Mrs. Mary Kennedy, as administratrix of the estate of D. C. Kennedy, sued the Director General of Railroads to recover damages for the death of her husband while acting as engineer on one of the Director General's trains on the lines of The Nashville, Chattanooga & St. Louis Railway.*

*The suit was originally instituted against The Nashville, Chattanooga & St. Louis Railway and John Barton Payne, Agent, jointly. It was dismissed as to said Railway, because the cause of action, if any, accrued during Federal control of railroads. James C. Davis, Agent, was substituted for John Barton Payne, his predecessor in the office of Director General of Railroads and Agent, under Sections 206 of the Transportation Act. (Rec., 202, 252.)

The suit was predicated solely upon the Federal Employers' Liability Act. The Safety Appliance Acts were not involved. (R., 16-20.)*

There was a verdict and judgment of eight thousand dollars in favor of the plaintiff. (R., 2.) This was reversed by the Court of Civil Appeals—an intermediate appellate court—for error in the charge, that Court sustaining the Director General's fourth assignment of error. (R., 209-221.) Both parties, being dissatisfied with the decision of the Court of Civil Appeals, filed separate petitions for writs of certiorari in the Supreme Court of Tennessee. (R., 212, 235.) Both petitions were allowed and the entire case transferred to the Supreme Court of Tennessee. (R., 240.)

The Supreme Court of Tennessee reversed the action of the Court of Civil Appeals and affirmed the judgment of the trial court in an opinion found on page 241 *et sequitur* of the printed record. The opinion of said Court contained a rather full statement of the ultimate facts. We

*Page references are to the printed, not to the original record. Page references in the petition for certiorari were to the original record.

ask no review thereof and are thoroughly content with that statement.

That learned Court did, we believe, commit two errors of law, respectively, as follows:

1. It held that the doctrine of assumption of risk was not applicable to this case—not because of the facts, but because under the Federal Employers' Liability Act an employee cannot assume the risk of the negligence of either the employing carrier or its employees. In other words, under no circumstances can an employee assume the risk incident to and resulting from the negligence of his fellow servants. (R., 246, 249, 251.)

2. It agreed with the Court of Civil Appeals that said fourth assignment of error filed by the Director General of Railroads was sound and that the charge of the trial court as therein complained of was erroneous. However, it concluded that the error was innocuous, and therefore did not justify a reversal and remand of the case. It held that it was harmless error to leave a jury free to determine the size of the verdict, without the statutory limitation of "compensation," the jury being limited only to

"such pecuniary allowance therefore as in your opinion is warranted by the evidence." (R., 195-196, 249-251.)

STATEMENT OF THE CASE.

We made numerous questions in the Tennessee courts which, however meritorious, may not properly be submitted here on certiorari. We therefore confine ourselves in the statement of the case to only so much thereof as may be pertinent to the proper appreciation and determination of the two questions of law which we submit to this Court.

A statement of the pleadings is unnecessary save to say that the cause of action was predicated solely and alone upon the Federal Employers' Liability Act. (R., 16-20.)

As aforesaid, we are content with the succinct statement of the case as made by the Supreme Court of Tennessee in its opinion. In our petition for certiorari, directed to the Supreme Court of Tennessee, we made a very complete and accurate statement of the case and the evi-

dence. (R., 212 *et sequitur.*) It is unnecessary to repeat this here. We simply quote and adopt the statement of facts as made by the Tennessee Supreme Court (R., 241-243):

> "The accident occurred at about 7: 20 A.M., on July 9, 1918, at a point about four miles west of Nashville, when westbound passenger train No. 4 collided, head on, with eastbound passenger train No. 1.
>
> "Passenger train No. 4 is a westbound train due to leave the Union Station at Nashville at 7: 00 o'clock in the morning, daily. Passenger train No. 1 is a train due to arrive at the Union Station at Nashville, from the west, at 7: 10 A.M. daily. Under normal circumstances these trains pass each other a short distance west of Nashville. The Railway is double-tracked for a distance of 2½ miles west of Nashville, between the Union Station and a point called 'Shops.' Beyond Shops the Railway is single-tracked. At Shops there is located a tower in charge of an employee, who, under orders from the train dispatcher at Nashville, sets the switches which permit trains to pass from the double tracks to the single track, and from the single track to the proper double track. He also operates a

signal device or semaphore, the sole purpose of which is to indicate to trainmen whether or not the switch in front of the train is so set as to enable the train to go forward upon the proper track, if the approaching train has the right to go upon the track. The right of the train to go upon the track is derived from train orders or from schedules and not from the signal device. By the schedules and rules of the Railway, passenger train No. 1, due to arrive at Nashville at 7: 10 in the morning, was a superior train and had the right of way over train No. 4, due to leave Nashville at 7: 00 in the morning. In other words, train No. 1 could proceed on the assumption that train No. 4 would be out of the way.

"In order to prevent train No. 4 from proceeding west of Shops before train No. 1 had arrived at Shops, the crew of train No. 4 had positive instructions never to pass Shops unless they knew as a fact that train No. 1, in the opposite direction, had passed Shops in the direction of Nashville. If the crew of train No. 4 were uncertain or did not know that train No. 1 had been passed between Shops and Nashville, it was their duty to stop their train at Shops and telephone the train dispatcher at Nashville for orders. Under this system of operation, it

was incumbent upon the train crew to recognize, by the use of their senses of sight and hearing, train No. 1 as it passed them going in an opposite direction on a parallel double track. In case they passed other trains than train No. 1, and similar in appearance, it was, of course, under the system above outlined, incumbent on the train crew to distinguish such other train from train No. 1. This system placed a heavy responsibility and duty upon each member of the train crew. This duty to recognize train No. 1 was upon the conductor, engineer, fireman and flagman. All of these men obviously had other duties to perform. The conductor was required to go through his train and collect tickets and fares. The engineer, seated on the right of the cab of the engine, in addition to keeping a lookout, was concerned with the performance of his engine, the speed, and the various gauges in front of him. The fireman, in addition to his duties of keeping a lookout, was required to shovel fuel into the firebox. The flagman was required to protect the rear of the train and to assist the conductor. The safety of the train, the lives of the crew and the passengers depended upon the correctness of the crew's judgment in recognizing and distinguishing train No. 1 as they passed it. A

mistake in this respect would almost certainly result in a collision. Hence it was a wise precaution to place the duty to recognize, distinguish and know upon each member of the crew, and not upon one member.

"On the morning of the collision the crew of train No. 4 consisted of Conductor Eubanks, in charge of the train, Engineer Kennedy, Fireman Meadows, Flagman Sinclair. The train left the Union Station at Nashville at 7: 05 A.M., five minutes before train No. 1, coming into the Union Station from the west, was due to arrive. Just before train No. 4 pulled out, Conductor Eubanks and Engineer Kennedy were each handed a train order, which read:

" 'No. 4 engine 282 hold main track. Meet No. 7 Eng. 215 at Harding. No. 1 has Eng. 281.'

"The conductor and engineer read the order to each other; the conductor gave his copy to the flagman, and the presumption is that the engineer read his copy to the fireman.

"Harding, the point where No. 4 was to pass No. 7, is west of Shops and west of the point of the collision, and this part of the train order does not enter into the matter. The only reference to train No. 1 was that it had Engine 281. From this, in the cir-

cumstances, it is to be inferred that the crew of No. 4 must recognize these *members* (numbers) which are about ten inches high, on the engine of train No. 1, while passing at a speed of from 25 to 30 miles an hour. To see the numbers was the only positive identification. If the crew did not see them it was their duty to stop the train at Shops. They did not see them and they did not stop their train at Shops, because their train collided with No. 1, pulled by Engine 281, some two miles west of Shops.

"Train No. 4 was crowded with passengers en route from Nashville to a large government war plant near Nashville. Conductor Eubanks was working his way through the coaches collecting tickets and fares when at a point between Union Station and Shops something passed on the parallel track going in the direction of Nashville. At this moment the conductor had started to take tickets from the smoking compartment, and when he heard the noise of a train passing he tried to look out of the window to determine whether or not it was train No. 1. He saw 'something with steam,' but was unable to identify it. He heard the noise and saw the steam, but was unable to say whether it was a train similar in appearance to No. 1, or a switch en-

gine, or an engine with cars attached, but he assumed it was No. 1 and continued to take up tickets. He testifies that he relied upon and had confidence in the engineer, Kennedy, because he had explained to Kennedy the crowded condition of the coaches and had requested Kennedy to look out for No. 1, and Kennedy had agreed to do so. Also he testifies that he relied on the other members of the train crew, whose duty it was to look out for No. 1.

"When No. 4 arrived at Shops the semaphore signal was set at proceed, which only meant to the crew of No. 4 that if they had the right to go upon the single track west of Shops it was physically possible to do so, and that the switches were properly set for such movement. No. 4 proceeded to pass Shops going at about 20 or 25 miles per hour. The towerman called up the dispatcher and the dispatcher instructed him to stop No. 4 if he could. He blew an emergency whistle which failed to attract the attention of No. 4. A switch engine also blew and some persons attempted to wave No. 4 down, without avail, and it collided, head on, with No. 1 at a point about 1½ miles from Shops, and within three or four minutes after it has passed Shops. A number of people were killed and injured, among

them the engineer, Kennedy, and the fireman, Meadows, members of the crew of No. 4. The flagman, Sinclair, disappeared; hence conductor Eubanks is the only member of the train crew who testified."

SPECIFICATION OF ERRORS.

1. The Supreme Court of Tennessee erred in announcing as a principle of law that in a suit based on the Federal Employers' Liability Act an injured employee could only assume the risk resulting from his own negligence and that such an one could not in any event assume the risk resulting from the negligence of a defendant and of his, the plaintiff's, fellow servants. (R., 246, 249, 251.)

2. The Supreme Court of Tennessee erred in holding it to be harmless error to leave it to a jury to determine the size of the verdict without the statutory limitation of "compensation," the jury being affirmatively limited only to "such pecuniary allowances therefor as in your opinion is warranted by the evidence. (R., 249-251.)

BRIEF OF ARGUMENT.

I.

The Supreme Court of Tennessee announced as the doctrine of assumption of risk under the Federal Employer's Liability Act a rule inconsistent with the decisions of this Court.

The Supreme Court of Tennessee, in its opinion in this case on the question of assumption of risk, said:

> "If the engineer (or his dependents) could be barred of recovery at all in this case on the assumed risk doctrine it would seem to be on the theory only that the engineer assumed the risk of his own negligence, or, expressing it differently, that he assumed the risk of his own violation of the rules of the company and his duty. But the Supreme Court of the United States has held that although an engineer was negligent in the violation of a rule, he was still entitled to recover under the Federal Act." (R., 246.)
>
> . . . . . .
>
> "The facts and circumstances speak for themselves, and the conclusion is irresisti-

ble, that the Railroad Company, or some officer, agent or employees of the Railroad Company, *other than or in addition to the engineer*, was guilty of negligence, proximately causing, in whole or in part, the death of the engineer." (R., 249.)

. . . . . .

"Third. Under the law and the evidence the engineer did not assume the risk." (R., 251.)

It will be noted that to support the statement quoted from page 246 the Supreme Court of Tennessee cited only *Spokane R. R. Co. v. Campbell*, 241 U. S. 497. In the Campbell case the doctrine of assumption of risk could not be successfully invoked by the carrier, because the cause of action was predicated upon *both the Federal Employers' Liability Act and the Safety Appliance Acts.*

In the case at bar, as aforesaid, the Safety Appliance Acts are not involved, and the cause of action is predicated alone upon the Federal Employers' Liability Act. (R., 16-20.)

That the Supreme Court of Tennessee announced an erroneous rule of law is obvious from

an inspection of the following decisions of this Court:

Seaboard Air Line v. Horton, 233 U. S. 492, 508.
Great Northern v. Wiles, Admr., 240 U. S. 444, 449.
Jacobs v. Southern R. R., 241 U. S. 229.
Chesapeake & Ohio R. R. v. DeAtley, 241 U. S. 310.
Boldt, Admx., v. Pennsylvania R. R. Co., 245 U. S. 441, 445.
Pryor v. Williams, 254 U. S. 43.

Since the filing of the petition for certiorari here, this Court has rendered a decision which is conclusive of the case at bar, to-wit: *Frese v. Chicago, Burlington & Quincy Railroad*, 44 Supreme Court Reporter 1.

In the Frese case, plaintiff predicated her cause of action upon the Federal Employers' Liability Act and claimed as a ground of negligence the failure of her intestate's fellow servants to observe or assist in the observance of an applicable statute of the State of Illinois regulating the movement of trains where the tracks of two carriers cross. In deciding in favor of the carrier, this Court said:

"Moreover the statutes make it the personal duty of the engineer positively to ascertain that the train can safely resume its course. Whatever may have been the practice he could not escape this duty, *and it would be a perversion of the Employers' Liability Act* (April 22, 1908, c. 149, sec. 3; 35 Stat. 65, 66; Comp. St. sec. 8659) *to hold that he could recover for an injury primarily due to his failure to act as required, on the ground that possibly the injury might have been prevented if his subordinate had done more.* See *Great Northern Ry. Co. v. Wiles*, 240 U. S. 444, 448, 36 Sup. Ct. 406, 60 L. Ed. 732. If the engineer could not have recovered for an injury his administratrix cannot recover for his death. *Michigan Central R. R. Co. v. Vreeland*, 227 U. S. 59, 70, 33 Sup. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C, 176." (Italics ours.)

In the case at bar, the deceased engineer was required under the rules and practices of the Railroad, with which he was entirely familiar, to bring the train to a complete stop at the end of the double track *unless he himself personally knew that the opposing superior train had passed.* (R., 61-62, 70, 77, 98-99, 116-117.)

It was a fact, as clearly shown by the record (R., 73-74), and as found by the Supreme Court of Tennessee (R., 249), that all the members of the train crew were supposed to lookout for the safety of the train. However, Kennedy, the deceased engineer, was obviously in a place where he could see sooner, better and more constantly than any one else. (R., 115.) It was broad daylight. There were no abnormal conditions. Kennedy had been told that his opposing superior train, Number One, had not arrived, and he was given a train order enabling him to unmistakably identify that train as and when it should pass his train, Number Four, on the double track. The only thing Kennedy had to do to protect himself and the train was to follow reasonable rules and established practices with which he was thoroughly familiar. (R., 98, 116-117.)

It was his absolute, non-delegable duty before leaving the double track to personally know that train Number One had passed. What others knew or might know never modified his obligation. (R., 98, 117.)

When he pulled out on to the single track beyond the shops, the danger of that act and the inevitable consequences were so open and obvious that any person in the exercise of ordinary care would have known and appreciated the danger that existed.

With his eyes open, with full knowledge of all the facts, in broad daylight, under no abnormal conditions, contrary to the rules and established practices, he deliberately drove his engine from the double track to the single track *without having ascertained whether his opposing superior train, Number One, had passed or not.* It is obvious that he is bound, as any reasonably intelligent person would have been under similar circumstances, to have known that a collision was imminent and inevitable.

It cannot now be successfully argued, as held in the Frese case *supra*, that his administratrix can recover "for an injury primarily due to his failure to act as required on the ground that *possibly the injury might have been prevented if his subordinate had done more.*"

We submit that two conclusions are obvious and inevitable.

First. The Supreme Court of Tennessee erred in holding that under the Federal Employers' Liability Act, the engineer could not assume the risk of the negligence of his employing carrier and of his fellow servants.

Second. Under the undisputed facts and under the statement thereof contained in the decision of the Supreme Court of Tennessee recovery cannot be had for Kennedy's death simply because some of his subordinates and associates might have prevented the accident if they had done more.

II.

The Supreme Court of Tennessee held that it was harmless error for the trial judge to leave the quantum of recovery to the opinion of the jury, unlimited by the standard fixed by the statute itself, namely, "compensation."

That portion of the trial judge's charge relating to the quantum of recovery under challenge constituted the fourth ground of the Director

General's assignment of errors in the Court of Civil Appeals (R., 195) and the first and only assignment of Mrs. Mary Kennedy, Administratrix, in the Supreme Court of Tennessee (R., 239), and is as follows:

> "But if you should find for the plaintiff, you should go further and assess the damages. In doing this you will take into consideration the deceased's earning capacity at the time of his death, and his reasonable expectancy based upon the evidence, also whether or not his earning capacity would or would not have been diminished by reason of advancing years. The jury may further consider the care, attention, advice and instruction which the evidence shows, if such be the case, that deceased reasonably might have been expected to give his minor children, and *make such pecuniary allowance therefor as in your opinion is warranted by the evidence.*"

The Court of Civil Appeals in a rather elaborate opinion sustained this assignment on the authority of *Railroad v. Witherspoon*, 112 Tenn. 128. (R., 209-211.) The Supreme Court of Tennessee conceded that this charge was erro-

neous, but concluded that the record did not clearly show that it was prejudicial error. (R., 249-251.)

We are not challenging the charge merely as being meager. On the contrary, the trial judge laid down a guide to the jury and that guide was wrong. Their award was not to be "compensation" as shown by the evidence, but "such pecuniary allowance therefor as in your opinion is warranted by the evidence."

Were this phase of the case to be controlled by the general principles of the common law as interpreted by the Supreme Court of the State of Tennessee, the case would have been reversed by that Court.

Railroad v. Witherspoon, 112 Tenn. 128, 137-139.
Insurance Co. v. Ayers, 88 Tenn. 728, 734.
Citizens' St. R. R. v. Shepherd, 107 Tenn. 444, 450.
Railway & Lt. Co. v. Dungey, 128 Tenn. 587, 596.
Jones v. State, 128 Tenn. 493, 498.
Memphis St. Ry. v. Carroll, 141 Tenn. 265, 269.

If, on the other hand, as we believe to be the case, this question is to be determined from a consideration of the Act itself and general principles of law as interpreted by the decisions of this Court, the trial judge's charge was both erroneous and prejudicial.

Chesapeake & Ohio Ry. v. Kelly, 241 U. S. 485, 491.
New Orleans & N. E. R. R. v. Harris, 247 U. S. 367, 371-372.

Whatever is of substance, as is the measure or standard of recovery, depends entirely upon the Federal law.

Central Vermont Ry. v. White, 238 U. S. 507, 511-512.
Pryor v. Williams, 254 U. S. 43, 46.

Compensation is the standard and the limit of recovery. Instructions as to the measure of damages must affirmatively limit the quantum of recovery by the use of the word "compensation," or some word or phrase of similar meaning.

In *Michigan Central R. R. v. Vreeland*, 227 U. S. 59, 69, 70, 72, this Court held that the pecuniary loss to which a plaintiff was entitled under the Federal Employers' Liability Act must

be measured "by some standard" and that the standard was "compensation."

Further, a charge similar in substance to that now under attack was condemned by this Court, saying:

> "This threw the door open to the widest speculation. The jury was no longer confined to a consideration of the financial benefits which might reasonably be expected from her husband in a pecuniary way." (73.)
>
> . . . . . .
>
> "They were told to estimate the financial value of such 'care and advice from their own experiences as men.' These experiences which were to be the standard would, of course, be as various as their tastes, habits and opinions." (74.)

In *Chesapeake & Ohio Ry. Co. v. Kelly*, 241 U. S. 485, 489, this Court said:

> "The damages should be *equivalent to compensation* for the deprivation of the reasonable expectancy of pecuniary benefits that would have resulted from the continued life of the deceased."

See also *New York Central v. Winfield*, 244 U. S. 147, 149.

Where a charge is erroneous, prejudice is presumed.

In *Fillippon v. Albion Vein Slate Co.*, 250 U. S. 76, 82, this Court said:

> "And of course in jury trials erroneous rules are presumptively injurious, especially those embodied in instructions to the jury; and they furnish ground for reversal unless it affirmatively appears that they were harmless."

In *Boyd v. State*, 84 Tenn. 149, 154-155, the Court said:

> "It is very earnestly insisted, however, that conceding the instructions as erroneous, it could, in view of the evidence in the record, have worked no injury to the defendant, and consequently there should be no reversal of the cause on account of it. As it is said, if the jury believed this evidence on part of the defendant was false and procured by the defendant, and that the witnesses adduced by the State as to this matter were credible, they would, necessarily, under proper instructions, have found the

facts as testified to by them. It is a sufficient answer to this to say, that it was the peculiar province of the jury to determine this fact from the evidence, and it could not be taken away from them without a violation of the rights of the defendant. The fact was material, and this Court has often said, that to entitle the defendant to a reversal *it is not necessary that we shall see that the defendant must have been injured by the error complained of, but it is sufficient if he might have been injured by it.*" (Italics ours.)

There can be no presumption that there will be the same result when the law is followed and when the law is not followed.

Louisville & N. R. R. v. Greene, 244 U. S. 522, 554.

See also

Jones v. State, 128 Tenn. 493, 498.

Railway & Lt. Co. v. Dungey, 128 Tenn. 587, 596.

Lowry v. Railroad, 117 Tenn, 507, 514-520.

Where a case comes here from a state court "this Court will, for the purpose of determin-

ing whether the error found may have been prejudicial, examine the whole record. . . ." Further, the record must "convince us that the admitted error was harmless. . . ."

Yazoo & M. V. R. R. Co. v. Mullins, 249 U. S. 531, 533.
Davis v. Wechsler, 44 S. C. R. 13 (decided Oct. 22, 1923).

Respondent (page 17 of reply to our petition for certiorari) relies on *Carlisle Packing Co. v. Sandanger*, 259 U. S. 255. On pages 259 and 260 this Court said:

> "But mere error without more is not enough to upset the judgment, if the record discloses that no injury *could have resulted therefrom. West v. Camden*, 135 U. S. 507, 521." (Italics ours.)
>
> . . . . . .
>
> "In effect the charge was more favorable to the petitioner than it could have demanded, and we think no damage could have resulted from the erroneous theory adopted by the trial court."

Where instructions are more favorable than the law permits the party so favored cannot com-

plain because "no injury could have resulted therefrom." In the case at bar the admitted error was not "more favorable" but less favorable than the law, and injury certainly "could have resulted therefrom."

Both Tennessee Courts held that the charge in question was erroneous. The Supreme Court of Tennessee did not believe that the record affirmatively showed that the error was prejudicial. As aforesaid, prejudice is presumed from error. Those who claim the error to be innocuous must point out wherein it is clear that no harm was done. A consideration of this record, as this Court may do under the Mullins case *supra*, would seem to be conclusive that there is no real basis for the pure assumption that this admitted error was innocuous.

The undisputed facts clearly show that the error was prejudicial.

(a) The deceased Kennedy was 73 years of age when he died. (R., 24, 151-153.) This Court will take judicial cognizance of the fact that a man 73 years of age could not long continue to act as a locomotive engineer; hence un-

der normal conditions, the deceased would have shortly ceased his large earnings as a locomotive engineer.

(b) Further, the deceased Kennedy, under no unusual or abnormal conditions, violated the custom and practice with which he was thoroughly familiar, and his orders, hence was guilty of the grossest negligence. (R., 59-60, 69-70, 77, 113-117, 121-123, 141.) The principle that the violation of a reasonable rule is negligence *per se* is general. *Lake Erie & W. R. Co. v. Craig*, 80 Fed. 488, 495, decided by Circuit Judges Taft and Lurton and District Judge Clark; *American Zinc Co. v. Smith*, 128 Tenn. 447, 454-455.

Assuming that one or more of Kennedy's fellow servants were guilty of negligence, still it is obvious that Kennedy's negligence was so great in comparison to that of all others as to make a substantial recovery contrary to the decisions of this Court. A jury must (not may) diminish full compensation proportionately as the negligence of the plaintiff or plaintiff's intestate bears to the entire negligence attributable to all parties.

Norfolk & Western v. Earnest, 229 U. S. 114, 120, 122.
Illinois Central v. Skaggs, 240 U. S. 66, 70.
New York Central v. Winfield, 244 U. S. 147, 151.

Kennedy's fellow servants, except the fireman, were inside and in the rear of a vestibuled train, performing the various duties imposed upon them. The train was going up grade, and in the absence of evidence it is natural to presume that the fireman (who was killed) was shoveling coal. Kennedy was on the lookout ahead where he could see constantly and accurately. *He could see sooner, better and more continuously than any other person.* His fellow servants' ability to ascertain the approach and passage of train Number One, due to physical limitations, was not fairly comparable with his own; hence we submit that of the total negligence of all parties, that properly attributable to him was so great as to make any substantial recovery legally impossible.

(c) The deceased Kennedy was survived by a widow 56 years of age and two daughters who

had reached their majority, and one son 17 years of age. (R., 23-25.) After Kennedy's death his widow on his account continued to receive from the Government of the United States a pension of $30.00 per month. (R., 162.) In view of these facts, it would seem that the Supreme Court of Tennessee could not properly assume that this admittedly erroneous charge was harmless.

With these undisputed facts in mind, no Court can, we think, assume the burden of saying that the jury would have rendered a verdict of the same size whether the measure of damages given them for their guidance by the trial judge was right or wrong. A litigant has the right to go to trial with the law on the vital issues correctly charged. Of course, no issue is more vital than the measure of damages. There must be some standard and the "standard," as this Court said in the Vreeland case, is "compensation." Possibly the word "compensation" might properly be omitted if its legal equivalent is used. In the case at bar, however, the trial judge not only did not limit the award of the jury to compensation, but he used no word, no phrase, no expression, of the same or similar meaning, but,

on the contrary, he expressly gave them another and different limitation—namely, "such pecuniary allowance therefor as in your opinion is warranted by the evidence."

Respondent, Mrs. Mary Kennedy (page 15 of reply to petition for certiorari), contends that such limitation is not necessary, and cites *Chesapeake & Ohio Ry. Co. v. Carnahan*, 241 U. S. 241, 243, to sustain that conclusion. There is nothing in that case that militates in any way against our contentions here. Only the second assignment of error, which is discussed on pages 243-245, is pertinent to our case. The objection to the instruction of the Court was that it "allowed the jury to indulge in speculation and conjecture; invited their attention to the sum of $35,000 and allowed the jury to give such sum as damages as to them 'might seem just and fair,' without stating that the damages could be only such as were proved by the evidence to have proximately resulted from the negligent act complained of." (P. 244.)

The objection of counsel as shown by their own language was not that the trial judge did not limit the recovery to *compensation*, but that he

did not limit them to the amount "proved by the evidence to have proximately resulted from the negligent act complained of," and this was the point this Court decided. The question now before the Court was neither raised nor discussed.

Our jury system is predicated upon the belief that a jury will intelligently apply the law as given them by the Court to the facts as they find them from the evidence. To assume that the same result will be reached whether the instructions of a Court are right or wrong, is to deny the efficacy of and ultimately destroy the jury system.

There are, of course, many instances of innocuous error, but the instant case is not one of that character. A rule to guide the jury was given and that rule was inaccurate. The result naturally was wrong.

In a case predicated on a Federal statute, such as the Federal Employers' Liability Act, a defendant has the right to a trial before a jury wherein the measure of its liability is correctly stated. We claim that the word "compensation"

or some word or phrase of the same or similar import should have been used and that the failure so to do constituted prejudicial error. The charge under attack is not challenged for mere meagerness—an error of omission. On the contrary, the trial judge laid down a rule—a yardstick—and that rule was wrong. In the light of the facts above set out, it is not sufficient to say that the jury might have reached the same conclusion even if the law had been correctly given them. The carrier was or "might have been injured by it." This justifies a reversal. *Boyd v. State*, 84 Tenn. 149, 155.

We respectfully submit that this case should be reversed.

Respectfully submitted,

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No. 371

In the Supreme Court of the United States

OCTOBER TERM, 1923

JAMES C. DAVIS, AGENT,
PETITIONER,

versus

MRS. MARY KENNEDY, ADMINISTRATRIX,
RESPONDENT,

REPLY TO PETITION FOR CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petition for writ of certiorari in this case should not be granted:

I.

The first specification of error is that the Supreme Court of Tennessee announced that under the Federal Employers' Liability Act, an employee could not assume the risk of negligence of the defendant or of his fellow servants. (Petition, 8, 23, R., 246).*

*Page references refer to top paging of printed record.

Petitioner asks no review of the facts found by the Supreme Court of Tennessee. From the statement of that court, as well as by the finding of the jury approved by the trial court and the intermediate court, it appears that the conductor, flagman and fireman violated the rules of the Company and their duty and were negligent in permitting No. 4 to go on the single track without *knowing* that No. 1 had passed. (R., 249, 244, 242, 122, 121, 119, 111, 110, 52).

The Supreme Court of Tennessee found that the defendant had recognized that *all* of the crew had other duties to perform ~~other~~ than to look out for No. 1 and hence as a wise precaution placed that duty upon *each member* in order to avoid a *mistake*. (R., 242).

If any of these other three members of the crew had not been negligent, they could have angle-cocked, thereby stopping the train themselves, or pulled the train down, thereby notifying the engineer to stop same, as same ran one mile and a half after getting out on the single track. (R., 207, 99, 52).

So then, *it is now undisputed that three other employees of the defendant were negligent.*

The most of petitioner's argument as to prejudice suffered under this specification is that "the danger of running No. 4 out on the main track before No. 1 had passed was so open and obvious and the result so certain that respondent's intestate assumed the risk of the danger resulting from the admitted negligence of the other employees in failing to observe that No.

1 had not passed and to warn him" or (we say) to angle-cock the train. (Petition, 28).

This statement presupposes that Kennedy *deliberately* and intentionally ran his train out on this single track when he *knew* (not simply should have known) that the incoming train with superior rights was then due. This Court has said, in a similar case, that however plain such a mistake might be "the jury reasonably might find it to be no more than a mistake attributable to mental aberration, or inattention, or failure for some other reason to apprehend or compehend the order communicated to him." (*Spokkane & I. E. R. Co.,* v. *Campbell,* 241 U. S., 497, 508).

Petitioner's view *totally disregards* the effect of the finding of the jury and two State Appellate Courts and overlooks the rules that the burden of proving contributory negligence rests upon the defendant (*Burke* v. *Street Railway Co.,* 102 Tenn., 409) and that where there is no direct proof of what happened (there being no direct proof here as to what happened in the cab of the engine after the train left the Union Station), the jury has a right to even find ordinary care in accordance with the presumption of the instinct of self-preservation having been obeyed by the deceased (*Railway Company* v. *Herb,* 134 Tenn., 397.)

It must be remembered that the only negligent act the petitioner charges against respondent's intestate is that of running out on the single track without

knowing No. 1 had passed. It has never been contended that after the engineer got upon the single track that he could have seen No. 1 (at the place of the wreck) in time to have stopped and avoided a collision because it is undisputed he was just coming out of a deep cut, on a curve and where No. 1 would be so close before it could be observed that the trains could not be stopped in time at the speed they were travelling. (R., 143, 130, 129, 125, 107, and photographs filed with Jones' testimony).

An engineer has other duties to discharge than keeping a vigilant lookout ahead and it follows that the question of his contributory negligence in failing to keep such vigilant lookout is one of fact for the jury.

Central Railroad & Banking Co., v. *Kent*, 87 Ga., 402;
L. & N. Railroad v. *Hutt*, 101 Ala., 34;
Hall v. *Railway Co.*, 46 Minn., 439.

In the Literary Digest of February 14, 1920, page 86, there appeared an article in regard to a fireman stopping an express on the Philadelphia & Reading when the engineer was struck by some object while looking out of the window and became unconscious. Kennedy was an old and experienced engineer and such a thing may or may not have happened here; or, while performing some other duty, he may have explicitly depended upon his fireman to look out for No. 1. He had other engrossing duties to perform. (R., 242, 120).

Momentary forgetfulness of a known danger is not, as a matter of law, such negligence as will even, at common law, bar a recovery. See *Knoxville* v. *Cox,* 103 Tenn., 68.

Whether Kennedy was negligent or not is not the point as these other employees were negligent so that, under the Federal Statute, Kennedy's act not being the sole cause of the accident, there can be a recovery.

Grand Trunk W. R. Co., v. *Lindsay,* 233 U. S., 42, 47;

Illinois Central Railway Co., v. *Skaggs,* 240 U. S., 66, 69, 70;

Union Pacific Railroad Co., v. *Hadley, Admr.,* 246 U. S., 330, 333;

Pennsylvania Co., v. *Cole,* 214 Fed., 948;

Railroad Co., v. *Heinig's Admrx.,* (Ky.), 171 S. W., 852.

The facts in the Heinig case were quite similar to those in the- case at bar (except here more co-employees were at fault) and the reasoning of the Kentucky Court, based upon decisions of this and other Federal Courts, is unanswerable.

Or, to conform to the holding in the last three cases, *supra,* the rule might be stated in another way to be that where the accident would not have happened if another employee or employees had done his or their duty, a recovery can be had.

Indeed, under the rule of comparative negligence established by the Liability Act, no degree of negligence, however gross or proximate, on the part of a

servant (short of his act being the sole cause) will bar a recovery and the employer will be liable if any other employee or employees is guilty of any causative negligence, no matter how slight the negligence is in comparison to the negligence of the injured employee.

Pennsylvania Co. v. *Cole,* 214 Fed. 948;
N. Y. C. & St. L. R. Co., v. *Niebel,* (C. C. A. 1914), 214 Fed., 952.

The petitioner cannot avoid this rule of law by stating there was an "assumption of risk" any more than the defendant in the Lindsay case could nullify the terms of the statute by calling the plaintiff's act "the proximate cause."

The person whose "want of care," together with the danger flowing therefrom, must be known and appreciated under the above rule is that of the employer or co-employees of the injured party, *not that of the injured party himself.* That is the vice in petitioner's argument on his first specification of error, which is devoted *solely* to a discussion of Kennedy's negligence. (Petition, 24-30).

While under the Employers' Liability Act, negligence of co-employees may be an assumed risk, yet this is only where the negligence was, in fact, known to the plaintiff or was so customary that he must be charged with knowledge and, also, plaintiff must appreciate the danger.

Michigan, Etc., Railway Co., v. *Schaffer,* (C. C. A., 6th Circuit), 220 Fed. 809, 813;

C. & O. R. Co., v. *De Atley,* 241 U. S., 310, 315;

C., R. I. & P. Co., v. *Ward,* 252 U. S., 18, 21-22.

Petitioner cites no proof, and there is no proof, showing, or tending to show, that Kennery had *any reason* to know or believe that the flagman and the fireman would not, on this trip, look out for No. 1 and warn him or angle-cock the train if need be, nor that they had *ever* failed to look out for No. 1.

The only testimory intimating any possible knowledge by the engineer that any member of the crew might, at any time, not have been on the lookout for No. 1 appears in the cross-examination of Eubanks, the conductor (who was in the employ of the petitioner at its shops and being the only accessible surviving member of the crew was called by the respondent as a witness) (R., 65). Eubanks' answers to petitioner's questions were evidently not satisfactory as the matter was not pursued, so that the record was there left in imperfect shape on this point and the testimony is somewhat ambiguous and uncertain. But a fair inference therefrom is that on one or more occasions, *previous* to this occasion, Eubanks had specifically requested Kennedy to look out for No. 1 for him 'that morning,' that there was no regular custom of this kind however and that as the conductor did not make this specific request on other mornings, including the morning in question, Kennedy had the right to believe that Eubanks did not expect him on this morning to look out for him and,

hence, he did not assume the risk of the conductor's negligence. This issue was squarely, under correct instruction not now complained of, submitted to the jury (R., 186) and the jury, by its verdict (R., 2), found against the petitioner.

Under both the Federal and State rule, this settled the question of fact.

Richmond & Danville R. R. Co., v. *Powers*, 149 U. S., 43, 45;

Rapid Transit Co., v. *Seigrist*, 96 Tenn., 119, 124-125.

Indeed, that the jury should have found that Kennedy had no reason to believe that Eubanks or any other member of the crew would fail to look out for No. 1 that morning and hence did not assume any risk of their not doing so, is seen from Eubanks' clarification, on re-direct examination, of his former uncertain and ambiguous testimony when he said in regard to the custom as to looking out for passage of trains, etc., when his train was crowded:

> "I think it is the custom for *us all* to look out when we are crowded that way, for any member of the crew." (R. 73).

The Court of Civil Appeals, in affirming on this issue, appreciated the correct rule, under the Liability Act, on the assumption of risk of negligence of fellow servants. (R., 208).

Under the facts, the Supreme Court of Tennessee was correct in stating that both under the law and

the *evidence,* the engineer did not assume the risk. (R., 251).

In view of the above, it is immaterial whether or not language used by the Judge who delivered the opinion of the Supreme Court of Tennessee in another portion of the opinion properly bears the construction contended for by petitioner, *i.e.* that the doctrine of assumption of risk is abolished by the Employers' Liability Act, because such a situation is ruled by the case of *St. Louis & San Francisco Railroad Co.,* v. *Brown,* 241 U. S., 223, 227-8, in which this Court *declined to reverse on writ of error* the Supreme Court of Oklahoma in an Employers' Liability case where that Court flatly announced that the doctrine of assumption of risk had been abolished. However, the question of fact had been submitted to the jury in a trial court under charge not here complained of and this Court said:

> "At best, therefore the error asserted simply amounts to contending that because the court below may have inaccurately expressed in one respect its reasons for affirmance, that inaccuracy gives rise to the duty of reversing the judgment *although no reversible error exists.*"

See also *Seaboard Air Line Railway* v. *Moore,* 228 U. S., 433, 435, where the Circuit Court of Appeals for the Fifth Circuit was seemingly guilty of the same inadvertent statement.

The quotation from the Brown case squarely fits

petitioner's first specification of error and, hence, this Court will disregard same.

II.

The second specification of error is that the Supreme Court of Tennessee erred in holding that it was harmless error for the trial court to omit the word "compensation" in charging the jury as to damages. A consideration of this naturally subdivides itself into two heads: (A) Was this holding erroneous, and (B) If so, should writ of certiorari issue?

A.

The trial court, after reciting the proper facts to be considered by the jury in assessing the damages, instructed them "to make such pecuniary allowance therefor as in your opinion is warranted by the evidence. In no event should your verdict exceed the amount sued for in the declaration." (R., 185, 195-6, 249).

The objection thereto, taken when motion for new trial was filed, was simply that the jury were nowhere limited to "compensation." (R., 196). So that if the jury had been instructed at the conclusion "to give such compensation therefor as, in your opinion, is warranted by the evidence" or "to allow compensation therefor in such amount as is warranted by the evidence," there would have been no objection and yet, what difference is there in the sense of these several statements and in the understanding that the jury would have thereof?

The Supreme Court of Tennessee (R., 250-251) did not state whether the Federal or State law should control in measuring this question but held that this charge did not prejudice the defendants, and "while not strictly correct, there was *no evidence* in the record which tended to show that the verdict was in excess of the pecuniary loss sustained by the beneficiaries" and that the jury were well warranted in awarding that amount.

As to whether or not, in such a situation, the Appellate Court should reverse was a question of practice. Clearly, under the State rule, the Supreme Court committed no error in not reversing.

Thompson-Shannon's Code, § 4902a-1;
Acts of 1911, chap. 32;
Compress Co., v. *Insurance Co.,* 129 Tenn., 586, 597.

This statute reads (in the relevant part) "No verdict or judgment shall be set aside or new trial granted by any of the appellate courts of this state, in any civil or criminal cause, on the grounds of error in the charge of the judge to the jury * * * unless, in the opinion of the appellate court to which application is made after an examination of the entire record in the cause, it shall *affirmatively appear* that the error complained of has affected the results of the trial."

Under the Federal practice, an exception to any portion of the charge must be specific and is of no avail unless taken before the jury retires (*Pacific*

Express Co., v. *Malin,* 132 U. S., 531, 538) and the reason for this is, of course, that the trial judge may then and there consider the exception and have an opportunity to give new and different instructions if he should then deem it proper to do so. Under the Tennessee practice, there is no exception taken until the motion for new trial is made, after the jury has brought in its verdict. Hence, it is quite fitting that the rule announced by the Act of 1911 should prevail for, if parties are permitted to wait until some time after the verdict to go over the record and then critically examine same for exceptions, without any opportunity for the trial judge to have set himself right before the jury as that trial, the complaining party should be forced to show that he was, in fact, prejudiced.

The *practice* in an action in a State court under the Federal Employers' Liability Act is regulated by the law of the forum.

> *Chesapeake & Ohio Railway Co.,* v. *De Atley,* 241 U. S., 310, 317.

This we believe fully answers the second specification of error but to go further, we may say the question of proper measure of damages is inseparably connected with the right of action and must be settled by the Federal law.

> *Chesapeake & Ohio Railway Co.,* v. *Kelly,* 241 U. S., 485, 491.

A reading of charges approved by the Federal and many other courts shows that the use of the word

"compensation" is not necessary, but the Court can use any appropriate language conveying the idea of making pecuniary allowance warranted by the evidence for the damages or injury *flowing* or *resulting* from the negligence of the defendant.

Chesapeake & Ohio Railway Co., v. *Carnahan*, 241 U. S., 241, 243;
Southern Pacific Co., v. *Cavin*, 144 Fed., 348, 75 C. C. A., 350;
Railway v. *Otto*, 52 Ill., 416;
Munro v. *Pacific Coast, Etc., Co.*, 84 Cal. 515.

In the Carnahan case, the trial court, on the measure of damages, instructed the jury as follows:

> "The Court instructs the jury that if they believe from a preponderance of the evidence that defendant is liable to plaintiff in this action, then in assessing damages against the defendant, they may take into consideration the pain and suffering of the plaintiff, his mental anguish, the bodily injury sustained by him, his pecuniary loss, his loss of power and capacity for work and its effect upon his future, not however, in excess of $35,000.00, *as to them may seem just and fair.*"

It is to be noted that this instruction apparently gave the jury more latitude, by its verbiage, than did the instruction complained of in the instant case. This court, in affirming, held that this instruction was not objectionable as leaving the amount of damages to conjecture without regard to the evidence, where the Court explicitly enjoined upon the jury

that there must be a proximate and causal relation between the damages or injuries and the defendant's negligence.

In the instant case, the lower court repeated several times the language of the Act that the injuries or death must have *resulted,* in whole or in part, from negligence of the carrier; that said negligence, in whole or in part, must have been the cause of the injury and death of David Kennedy before the plaintiff could recover (R., 184, 185) and at the request of the defendants explicitly charged:

> "I charge you that an injury which is the natural and probable result of the act of negligence is actionable and (when?) such act is the proximate cause of the injury."
> R., 186.

The question of liability being determined, the damages or injuries to plaintiff arose solely from the death and the elements were properly stated and her damages were expressly limited to those "warranted by the evidence" and the charge was not erroneous, particularly, in the absence of request for further instructions.

The Tennessee case of *Railroad* v. *Witherspoon,* 112 Tenn., 128, which reversed the lower court for failure to use the word "compensation" in the charge, has been considerably limited by the decision of the Court of Appeals in *Telephone Co.,* v. *Carter,* 1 Tenn., C. C. A., 750, 771-7, (writ of certiorari denied by the Supreme Court of Tennessee) which sus-

tained a charge where the word "compensation" was not used.

But even if the Federal rule as to *practice* prevails and the strict State rule requiring the use of the exact word "compensation" governed, yet we must remember that the Federal rule of practice is that any error is not sufficient for reversal if the record discloses no injury resulted therefrom.

West v. *Camden,* 135 U. S., 507;
Carlisle Packing Co., v. *Sandanger,* 259 U. S., 255, 259.

And here the Tennessee Supreme Court found that not only "was the verdict not in excess of the pecuniary loss sustained but also the evidence tended strongly to show that the beneficiaries sustained *at least* this pecuniary loss and the jury was well warranted in finding this amount." The Supreme Court was entirely correct in this statement as the *undisputed* evidence showed that the decedent was earning $3,000.00 a year, was an extraordinarily vigorous man for his age, had never been sick, his expectancy of life was quite great, his family consisting of a wife (stone deaf), two daughters and a son, received practically all he made and he was greatly interested in and gave the best care and advice to, his family. (R., 81, 78, 106, 118, 180, 24, 25, 26).

The Carlisle Table (R., 180) shows average expectancy at this age to be 8.16 years and with Kennedy's extraordinary vigor he would have probably lived 11 or 12 years longer.

The Supreme Court of Tennessee, by refusing issuance of writ of certiorari in the case of *International Corporation* v. *Wood,* 8 Tenn., C. C. A., 10, 28, has heretofore adopted the rule that there should be no reversal for an erroneous instuction as to damages where it was apparent that no more than fair compensation was awarded and, it may be said, the Wood case was a personal injury case.

B.

The writ of certiorari provided for under § 237 of the Judicial Code, as amended September 6, 1916 (Chap. 448, 39 Stat. at L. 726, Comp. Stat. 1916, Section 1214) is not a writ of right but is granted or refused in the exercise of a sound discretion.

Philadelphia & Reading Coal & Iron Co., v. *Gilbert,* 245 U. S., 162, 165.

And in regard to this same writ, issued under Section 240 of the Judicial Code to Circuit Courts of Appeal, this Court, in the recent case of *Layne & Bowler Corporation* v. *Western Well Works,* 67 L. ed. 497, 499, stated that, so as not to add to an already burdened docket,

> " . . . .it is *very important* that we be consistent in not granting the writ of certiorari except in cases involving principles the setlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal."

The opinion of the Supreme Court in this case was not for publication, there is no principle involved the settlement of which is of importance to the public, but simply a question of local Tennessee practice as to when an Appellate Court will reverse for error and this, in a case, where the Supreme Court finds that the damages allowed were no more than fair compensation. This accident happened over five years ago (R., 17) and we do not believe the writ would issue to order a reversal where the respondent is entitled to a substantial verdict and upon a second trial, if a jury rendered a similar verdict, they would give no more than an Appellate Court thought proper, which was an amount less than the total of three years earnings of the deceased.

It is respectfully requested on behalf of Mrs. Mary Kennedy, Administratrix, that the petition as prayed be denied.

Respectfully submitted,

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